

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
TERRE HAUTE DIVISION

MARLENE H. TURNER,	)	
DAVID W. EVANS,	)	
STEVEN M. JACKSON,	)	
JAMES DONALD GREEN,	)	
	)	
Plaintiffs,	)	
vs.	)	NO. 2:04-cv-00028-JDT-WGH
	)	
KEVIN D. BURKE,	)	
GEORGE RALSTON,	)	
LYNN FRANCIS,	)	
PATRICK GOODWIN,	)	
CITY OF TERRE HAUTE, INDIANA,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
TERRE HAUTE DIVISION

MARLENE H. TURNER,  
DAVID W. EVANS,  
STEVEN M. JACKSON, and  
JAMES DONALD GREEN,

Plaintiffs,

vs.

2:04-cv-0028-JDT-WGH

KEVIN D. BURKE, individually and as  
Mayor of the City of Terre Haute, Indiana;  
GEORGE RALSTON, individually and as  
Chief of Police of the City of Terre Haute,  
Indiana; LYNN FRANCIS, individually and  
as City Attorney for the City of Terre Haute,  
Indiana; PATRICK GOODWIN, individually  
and as City Engineer of the City of Terre  
Haute, Indiana; and the CITY OF TERRE  
HAUTE, INDIANA;

Defendants.

**ENTRY RECONSIDERING AND GRANTING IN PART**

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 35)<sup>1</sup>**

This matter comes before the court *sua sponte*. In this action Plaintiffs Marlene H. Turner, David W. Evans, Steven M. Jackson and James Donald Green allege that their employment with the City of Terre Haute, Indiana, was unlawfully terminated for politically motivated reasons after a change in administration in the Office of the Mayor. On August 4, 2005, the court issued an Entry on Defendants' Motion for Summary Judgment that indicated

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<sup>1</sup> This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

that all but one of the plaintiffs' claims would be dismissed. What remains is Count I of the Complaint, in which Ms. Turner asserts that she was terminated by the City of Terre Haute, Indiana, "solely due to her political affiliation . . . ." (Compl. ¶ 9.) After additional review of the case file in preparation for the upcoming November 28, 2005 trial, the court held an oral argument to reconsider the denial of summary judgment on that claim. After considering the points made during that argument, the court has determined that this remaining claim must also be dismissed for the reasons stated below.

## **I. BACKGROUND**

The facts here are not substantially different than those set forth in the August 4, 2005 Entry. However, it is necessary to offer a more detailed and focused summary of the facts surrounding Ms. Turner's unlawful termination claim, as it is now subject to reconsideration.

Ms. Turner first became employed by the City of Terre Haute, Indiana (the "City") as secretary to the Chief of Police in July 2001, when then Chief of Police James A. Horrall hired her. Mr. Horrall had been appointed Chief of Police by Mayor Judy Anderson after her election to that office in November 1999. Ms. Turner met Ms. Anderson during Ms. Anderson's 1999 mayoral campaign, and first campaigned for her during that election. Ms. Turner assumed that Mayor Anderson was helpful in her obtaining employment as the Chief's secretary. During the primary campaign for mayor of the City in 2002 and 2003, Ms. Turner actively and openly campaigned in support of Mayor Anderson, who was being opposed by Defendant Kevin Burke. Ms. Turner's campaign activities included placing a bumper sticker on her car, wearing a campaign shirt, attending numerous political events, volunteering her time and writing letters to the editor that were published in the Terre Haute Tribune Star. Apparently Ms. Turner and

candidate Burke crossed paths at least once during the campaign at a campaign event where Ms. Turner accused Burke of trading promises of City employment for votes.<sup>2</sup>

Despite the efforts of Ms. Turner and others, Ms. Anderson lost the primary election to Burke, who ultimately won the general election in November 2003. At that time, Mayor-elect Burke indicated that he would be making a number of changes in City personnel, including replacing Chief Horrall with George Ralston. On November 7, 2003, Mayor-elect Burke sent a letter to Ms. Turner terminating her employment with the City effective January 1, 2004. The letter reads in relevant part: "As part of the organization of my administration, you will not be retained in the position of Chief of Police Secretary . [sic] Effective January 1, 2004 your employment with the City of Terre Haute is terminated." (Defs.' Mot. Summ. J. Ex. 3.)

Ms. Turner acknowledges receipt of the letter. Evidently in response, she drafted two letters dated November 24, 2003. She drafted the first for signature by Chief Horrall, addressed to "To Whom It May Concern." The letter states, "[e]ffective December 1, 2003, Marlene Turner is being transferred to the Records Department of the Terre Haute Police Department. This transfer is based on prior practice, so that the new Chief of Police can hire a secretary of his/her choice." (Defs.' Mot. Summ. J. Ex. 6.) Ms. Turner signature-stamped Chief Horrall's signature on the letter with his permission after contacting him at home, where he had been recuperating from recent surgery.

On that same day Ms. Turner drafted a second letter from herself to Mayor-elect Burke. In it, she states that she received his November 7, 2003 letter. She continues, "[b]ased upon prior practice, I have transferred to the Records Department of the Terre Haute Police

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<sup>2</sup> Ms. Turner's antipathy toward candidate Burke was reflected in the earlier Entry in which the court noted that after the 2003 primary, Ms. Turner shifted her campaign efforts in favor of Mr. Burke's Republican opponent in the general election.

Department, so that the new Chief of Police can hire a secretary of his/her choice.” (Defs.’ Mot. Summ. J. Ex. 4.)

Ms. Turner continued to work, at least part-time, in her position of secretary until December 1, 2003, when she officially transferred to the Records Division in the position of records clerk. On that day, she began to be paid from the Records Division payroll and also began performing some duties as a records clerk. She has produced handwritten notes that show that she was being trained in the Records Division after December 1. However, at that time Ms. Turner also continued to work part-time in the Chief of Police’s office, where she retained her desk and a password to her computer. She also continued to open the Chief of Police’s mail and answer the office telephone.

Indeed, Ms. Turner was working in the Chief of Police’s office on December 16, 2003, when she was visited by Mayor-elect Burke and Lieutenant Bill Bergherm. At that time, Burke reiterated to Ms. Turner that her employment with the City would be terminated effective January 1, 2004. The conversation apparently became heated, and Ms. Turner responded that there must have been a misunderstanding and she intended to take legal action, to which Burke replied, “[t]hat’s fine.” (Defs.’ Mot. Summ. J. Ex. 11.) Ms. Turner did not show up for work with the City on or after January 1, 2004. She filed a complaint with this court on February 12, 2004.

## **II. DISCUSSION**

In her complaint, Ms. Turner asserts that Mayor Burke terminated her as punishment for her support of Ms. Anderson in the mayoral election, and therefore her termination was politically motivated in violation of the First Amendment to the U.S. Constitution. Moreover, she suggests that Mayor Burke’s actions were systemic, as he had “an intentional policy to retaliate against municipal employees who exercise their constitutional right to oppose the candidacy of

the Mayor.” (Resp. 24.) Defendants move for summary judgment on this claim, suggesting that “[b]ecause Marlene Turner was a political employee, the city could terminate her and did not have to transfer her to a non-political position.” (Defs.’ Mot. Summ. J. 28.)

#### **A. Standard of Review**

The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits and other materials demonstrate that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).

#### **B. The Plaintiff Has Established a Prime Facie Case of Politically Motivated Termination**

“With notable exceptions, dismissals of public employees for reasons of political patronage are violations of the First Amendment.” *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1259 (7th Cir. 1985) (citing *Elrod v. Burns*, 427 U.S. 347, 359 (1976)). In this case, to determine whether Ms. Turner’s dismissal constitutes such a violation, the court first must decide if Ms. Turner has made a prima facie case of politically motivated termination. To make such a showing, a plaintiff must prove by a preponderance of the evidence that (1) she engaged

in a constitutionally protected activity; and (2) that constitutionally protected activity was a substantial factor in the decision to terminate her employment. *Simmons v. Chi. Bd. of Educ.*, 289 F.3d 488, 491-92 (7th Cir. 2002). The Seventh Circuit has noted that a plaintiff's burden to make such a case is not insignificant. See *Nekolny v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981). For example, a disgruntled employee fired for legitimate reasons would not be able to satisfy the burden merely by showing that he was a member of a particular political party or that he "favored the defendant's opponent in the election." *Id.*

Ms. Turner has made a prima facie case of politically motivated termination, as the court previously concluded in its August 4, 2005 Entry. The conclusions set forth at pages 5-8 of that Entry are incorporated herein by reference. Thus, the court turns to a more difficult issue—whether Defendants have shown that Ms. Turner's termination, while politically motivated, was justified.

### **C. The Plaintiff's Termination Was Justified by the Nature of Her Position**

If a plaintiff makes a prima facie case that political affiliation was a motivating factor in her termination, the burden then shifts to the defendants to prove that the termination was constitutionally justified because there was a compelling reason for that termination. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 755 (7th Cir. 2002). *Elrod v. Burns*, 427 U.S. 347, 372 (1976) offers one such compelling reason for dismissal that is relevant here—that the person who was terminated held a "confidential" or "policy-making" position within the government.

#### **1. The Circumstances of the Plaintiff's Termination**

The parties disagree on whether Ms. Turner held a confidential or policy-making position with the City and at what point. Ms. Turner explicitly argues that on the date of her termination

on December 16, 2003, she was officially employed by the Records Division of the Police Department in a merit position that she contends had no confidential or policy-making duties that could justify her termination. However, on November 7, 2003, shortly after the election, Ms. Turner received a letter from Mayor-elect Burke in which he explicitly intended to terminate her employment effective January 1, 2004. The letter reads: "As part of the organization of my administration, you will not be retained in the position of Chief of Police Secretary . [sic] Effective January 1, 2004 your employment with the City of Terre Haute is terminated." (Defs.' Mot. Summ. J. Ex. 3.) On that date, Ms. Turner was employed as the secretary to the Chief of Police, an arguably political position with confidential duties that, according to Defendants, may have justified her termination.

The November 7 letter is unambiguous, and no reasonable person could interpret it to mean anything but that Ms. Turner was notified on November 7, 2003 that her employment would be terminated effective January 1, 2004. Ms. Turner acknowledges that she received the letter, and her reaction to it tends to suggest she understood its intent and effect. It therefore becomes necessary for the court to determine whether the outgoing administration and Chief Horrall could then shelter Ms. Turner from Mayor Burke's politically motivated termination by transferring her to a merit position in the Records Division.

## **2. The Plaintiff's Transfer to the Records Division Was an Unlawful Politically Motivated Employment Action**

As noted in the August 4, 2005 Entry, there is a dearth of case law in this Circuit addressing whether an outgoing administration can shelter its political appointees prior to a new



administration taking office by transferring those employees from political to merit positions.<sup>3</sup> The Seventh Circuit does, however, offer some guidance in *Bicanic v. McDermott*, 867 F.2d 391, 394 (7th Cir. 1989). In *Bicanic*, the plaintiff held the position of coordinator of the municipal park and recreation program in Hammond, Indiana. He all but conceded that the position was inherently political in nature, as he had been responsible for organizing and coordinating the park program, preparing the budget, interviewing candidates for employment and recommending who should be hired and negotiating construction contracts. However, before a change in city administration, the plaintiff's employment duties changed, apparently leaving him with no confidential or policy-making responsibilities. Despite this, the incoming administration terminated his employment. He filed suit, arguing that the termination was unlawfully politically motivated because by the time the new administration had taken office, his position been stripped of all political job responsibilities.

The Seventh Circuit disagreed, in large part because it believed that the change in the plaintiff's job responsibilities, "their erosion, and the denouement were all political in nature." *Id.* at 395. It stated, "[a] political appointee does not acquire tenure as a civil servant when the tasks of the job are abolished or redistributed -- for the abolition of a political job is itself a political deed, no more actionable than firing the holder of a job whose duties are unchanged." *Id.* at 394. See also *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (it is unlawful not only to terminate, but also to hire, promote or transfer on the basis of political allegiance); *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004); *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 663 (3d Cir. 2002). The Circuit ruled that the city was within its legal bounds in terminating the

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<sup>3</sup> This practice has been referred to as "burrowing" when applied to federal political employees. See Mike Causey, "How They Leap and Burrow," *The Washington Post*, March 17, 1996. The origin of that term may come from the reference to those who attempt to maintain their former political allegiances while avoiding political termination as "moles."

plaintiff's employment because he was a political employee subject to termination under *Elrod*, and the politically motivated change in his job responsibilities was ineffective. *Id.* at 305.

The Sixth Circuit has addressed this issue from a slightly different perspective—whether an incoming administration must shelter political appointees of previous administrations by transferring those employees from political to merit positions. In *Faughender v. City of North Olmsted, Ohio*, a plaintiff who had been terminated from city employment argued that the city was required to place her in a merit position in lieu of terminating her. 927 F.2d 909 (6th Cir. 1991). Citing *Rutan*, and offering a number of policy arguments, the Sixth Circuit denied the plaintiff's request and explicitly proscribed such an action. It stated that the plaintiff's request that the city “take her political beliefs – that she opposed the new administration – into consideration when deciding how to fill these new positions . . . is precisely the sort of consideration that *Rutan* proscribes.” *Id.* at 916-17. In sum, *Rutan*, *Bicanic* and *Faughender* clearly prohibit the City from transferring Ms. Turner based on politically motivated considerations.

Making all reasonable inferences in favor of Ms. Turner, the court concludes that political considerations were exactly why she was transferred. Ms. Turner was essentially a political appointee who received her job through political connections. She was hired by Chief Horrall, and according to her deposition testimony, presumably with the aid of Mayor Anderson, for whom she had previously campaigned. (Turner Dep. 8-9.) Prior to receiving the November 7, 2003 termination letter from Mayor-elect Burke, Ms. Anderson's political opponent, Ms. Turner had shown no interest in being employed in any merit position with the Police Department, and certainly not as a records clerk. But about two weeks after receiving the termination letter, Ms. Turner requested a transfer to such a position, and drafted a letter to that effect to be signed by Chief Horrall. This action demonstrates her obvious intent to be sheltered from the termination

of the incoming administration of her political opponent, of which she clearly had notice. Ms. Turner is unable to show that she followed ordinary city procedures or policies for requesting and obtaining the transfer, as she merely called upon Chief Horrall to sign a letter approving it. Regardless of whether Ms. Turner possessed qualifications comparable to other records clerks in the Police Department in 2003, she cannot show that she undertook a routine application process to obtain that assignment.

Even after her transfer to the Records Division, Ms. Turner continued to work at least part-time in the Chief of Police's office. Indeed, she was there when Mayor-elect Burke visited on December 16, 2003 and reiterated that she had been terminated effective January 1, 2004. While there may be a dispute over whether Ms. Turner even worked as a records clerk at all, that dispute is immaterial to the analysis here, as the court need not reach that point. Ms. Turner's failure to report to work on or after January 1, 2004 is an indication that she believed her transfer to the Records Division to be ineffective and her employment with the City (as secretary to the Chief of Police or otherwise) officially terminated as of that date.

Furthermore, it appears that the Police Department regularly took action to shelter other such political employees. Chief Horrall stated in his declaration that the Police Department had a practice of transferring secretaries of the Chief of Police to the Records Division upon changes of administration, and that practice is evidenced in other documents in the record as well. (Horrall Decl. ¶ 10.) This practice, which appears to have taken place without regard to the qualifications of the transferred employees, suggests that the Police Department routinely transferred its employees solely to avoid their termination by incoming political opponents.

Based on these facts, and because no material evidence demonstrates otherwise, the court concludes that Ms. Turner was transferred to the Records Division solely for political reasons. Therefore, her transfer was unlawful and cannot stand. See *Rutan*, 497 U.S. at 75.

### 3. The Position of Secretary to the Chief of Police is Political

The court then is left to determine whether the position of secretary to the Chief of Police, the position Ms. Turner held at the time of her termination but for her unlawful transfer, is a “confidential” or “policy-making” position, *Elrod*, 427 U.S. at 372, such that her termination would have been justified. Evidently because she relies largely on her position that she was serving as a records clerk when she was terminated, Ms. Turner does not offer more than a passing argument that the position of secretary to the Chief of Police was a merit job not subject to politically motivated termination. However, that is exactly what Defendants argue, and their argument holds weight.

The Seventh Circuit acknowledges that identifying whether a position is political and therefore subject to politically motivated termination is “no mean feat.” *Riley v. Blagojevich*, Nos. 04-3085, 04-3436, — F.3d —, 2005 U.S. App. LEXIS 20631 (7th Cir. Sept. 23, 2005). To do so, a court should look to “the nature of the responsibilities and focus on the duties inherent in an office, and not the functions of the position performed by a particular person.” *Thompson*, 300 F.3d at 756.

As for the specific position of secretary to a policy-maker, Defendants are quick to point out that the Seventh Circuit (and the Sixth, for that matter<sup>4</sup>) has found such a position to be political. In *Soderbeck v. Burnett County, Wis.*, the Circuit first acknowledged that a secretary to an elected official may be terminated without violating the First Amendment because the position is political. 752 F.2d 285 (7th Cir. 1985). The court stated, “an elected official’s secretary is a position for which political affiliation is required due, in part, to the close and confidential relationship which exists between the official and his personal secretary.” *Id.* at

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<sup>4</sup> *Faughender*, 427 F.3d 913-914.

1093. Subsequent cases have reiterated this conclusion. *Hobler v. Brueher*, 325 F.3d 1145 (9th Cir. 2003); *Steele v. City of Bluffton*, 31 F. Supp. 2d 1084 (N.D. Ind. 1998).

Defendants urge the court to adopt the rationale in these cases and offer a conclusory ruling that Ms. Turner's position is political as a matter of law. The court simply cannot go that far. While the Seventh Circuit and other courts previously have found the position of secretary to a policy-maker to be political, the Circuit has also stated that the inquiry is particularly fact intensive, and should not be guided merely by the job description of a position. *See Milazzo v. O'Connell*, 925 F. Supp. 1331, 1343-44 (N.D. Ill. 1996) (citing *Nekolny*, 653 F.2d at 1169). Therefore, it becomes necessary for this court to examine the specific attributes of the position of secretary to the Chief of Police of Terre Haute in order to determine whether the position is truly political.

In her deposition, Ms. Turner offered a fairly detailed description of her duties as secretary to the Chief of Police. She testified that she answered telephone calls, attended business functions, wrote letters, prepared a monthly newsletter, coordinated inter-agency meetings and assisted with police officer recruitment. (Turner Dep. 17, 21-22). She also maintained a set of personnel files with performance evaluations of the police officers. (*Id.* at 28.) From Ms. Turner's description, these responsibilities appear to require a certain amount of discretion and confidentiality—more than those required of a merit position such as a records clerk. The secretary is privy to the Chief of Police's communications, both written and oral, and has an intimate knowledge of the functions he attends and citizens with whom he meets. While Ms. Turner offers a more recent declaration in which she concludes that these duties are not political (Resp. Ex. 6), the court simply cannot rely on this self-serving conclusion of law that does not overcome the body of evidence that indicates otherwise.

Additionally, in deciding whether a position is political, courts must examine not only the past and present duties of the position, but also the anticipated future responsibilities.

*Faughender*, 927 F.2d at 914. This is particularly true in cases where there is a change in administration that may alter fundamentally a position's job description or responsibilities. *Bost v. Reno*, 657 F. Supp. 128, 130 (S.D. Ill. 1987) ("It is clear from the affidavits before the Court that the discharge of the plaintiff as secretary to the newly-appointed Chief of Police was based on her inability to be trustworthy in a position requiring a high measure of security."). The job description of "Chief's Secretary" written after the 2003 election indicates that the secretary to the Chief of Police "answers incoming calls and greets customers," "prepares business letters and memos for the Chief" and "attend[s] functions designated by the Chief." (Ralston Aff. Ex. A.) In this case, the incoming Chief of Police George Ralston indicates that he could not rely on Ms. Turner to perform these duties with discretion as his secretary. In his affidavit he states:

Regarding the position of secretary to the police chief, I believed it was necessary to hire my own secretary, someone on whom I could completely rely upon and trust would keep sensitive information confidential, including confidential memos and other writings which I would dictate. My secretary types all my dictation. I did not know Marlene Turner and didn't know whether or not she could maintain the confidentiality of my communications and other sensitive information. I did not want to hire her as my secretary.

(Ralston Aff. ¶ 14, Defs.' Mot. Summ. J. Ex. 41.) Ms. Turner herself does not affirmatively deny that her political allegiances might have interfered with her ability to perform these duties. Indeed, her act of requesting a transfer from the Chief of Police's office to a merit position in the Records Division is an implicit suggestion that such interference may have been a concern to her as well.

Based on these facts, it is clear that the position of secretary to the Chief of Police of Terre Haute as of 2003 and 2004 was political in nature. As such, while Ms. Turner has made a

prime facie showing that her termination was politically motivated, Defendants have shown that the termination was justified by the change in administrations.<sup>5</sup>

**D. Alternatively, the Plaintiff's Employment Termination Was Not the Result of a Policy-Maker's Decision**

All that being said, whether Ms. Turner's termination was justified because she held a political position may not be an issue that had to be reached in this case. Ms. Turner's claim is premised on municipal liability under 42 U.S.C. § 1983—that the City of Terre Haute should be held liable for actions resulting from unconstitutional customs or policies. Defendants question Ms. Turner's fundamental conclusion that the City may be held liable for Mayor Burke's actions. They suggest that because Burke had not yet assumed the Office of Mayor when he announced that Ms. Turner would be terminated and because Ms. Turner then chose not to return to work based on the mayor-elect's representation, there was no adverse or unlawful employment decision by a City employee for which the City may be held liable. More generally stated, Defendants assert the City may not be held liable in damages to a person for a custom or policy that has not yet been put into effect as to that individual.

When a plaintiff sues a municipality under 42 U.S.C. § 1983 for acts of its employees, she must demonstrate how the municipality may be held liable. In *Monell v. N.Y. City Dep't of Soc. Srvs.*, 436 U.S. 658 (1978), the Supreme Court ruled that local governmental bodies could not be held liable under § 1983 “simply because they employed the tortfeasor acting within the scope of his or her employment.” To succeed on her claim, a plaintiff then must show that enforcement of a municipal policy, or some other deliberate municipal action, caused the

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<sup>5</sup> This conclusion further bolsters the justification for the court's earlier determination that Chief Ralston and Mayor Burke are entitled to qualified immunity from Ms. Turner's claims against them in their individual capacities.



alleged constitutional deprivation and its consequential damages. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122-23 (1992); *City of Canton v. Harris*, 489 U.S. 378, 385-86 (1989). A plaintiff has three alternative means for establishing municipal liability for a deprivation of her rights. First, she may prove the existence of an express municipal policy, the enforcement of which is inherently unconstitutional. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985). Second, she may show that an injury resulted from enforcement of an unexpressed municipal policy that exists due to the “deliberate indifference of municipal officials.” See *Graham v. Sauk Prairie Police Comm’n*, 915 F.2d 1085, 1100 (7th Cir. 1990). Neither of the first two means are applicable here, as Ms. Turner does not allege, nor has she proven, that there was a policy, expressed or otherwise, that called for the termination of City employees based on political activities.

Ms. Turner relies on the third means of proving municipal liability to support her contention that the City should be held liable for Mayor Burke’s actions. This is when the actions alleged to have violated a plaintiff’s constitutional rights are taken directly by a person with final policy-making authority. See *Glatt v. Chi. Park Dist.*, 87 F.3d 190, 193-94 (7th Cir. 1996); *Auriemma v. Rice*, 957 F.2d 397, 399 (7th Cir. 1992). The identification of those officials whose decisions represent the official policy of the local governmental unit is a legal question to be resolved by the trial judge before the case is submitted to the jury. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

Whether a particular official has final policy-making authority is a question of state law. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). State or local law “will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government’s business.” *Auriemma*, 957 F.2d at 400. In the instant case, Ms. Turner contends that Defendant Burke was an individual with final policy-making authority for

the City of Terre Haute Police Department. Of particular concern to the court is the fact that at the time of Ms. Turner's alleged termination, Defendant Burke had not yet taken office. Of course, there are no cases under Indiana or other state law that discusses whether a mayor-elect can be a final policy maker for the purposes of determining municipal liability. However, Indiana Code § 36-3-3-2, which governs the election and qualifications of the mayors elected in the State of Indiana, does offer some guidance. It describes the term of the mayor as ". . . (4) years, beginning at noon on January 1 after election and continuing until a successor is elected and qualified." I.C. § 36-3-3-2(c). The statute clearly suggests that a mayor-elect has no official role within city government that could expose the city to municipal liability unless or until the mayor assumes office on the January 1 after being elected. The Indiana Court of Appeals briefly discussed this concept in *City of Hammond v. Conley*, 498 N.E.2d 48 (Ind. App. 1986), *overruled by Osler Inst., Inc. v. Inglert*, 569 N.E.2d 636 (1991). In *Conley*, the court addressed when letters of termination signed by the mayor-elect of Hammond, Indiana, became effective. It affirmed the lower court's ruling that the termination letters could not have been effective until the mayor-elect was sworn into office at 12:00 noon on the January 1 after the election. *Id.* at 50.

Based on this guidance, the court concludes that Mayor-elect Burke was not a final policy-making authority for the City of Terre Haute when he announced his intention to terminate Ms. Turner's employment effective January 1, 2004. Whether Ms. Turner's termination is believed to have occurred on November 7, 2003 or December 16, 2003 is of no import. On both days, Mayor-elect Burke, having not yet been sworn into office, had no authority to terminate Ms. Turner's employment with the City. Like the mayor-elect in *Conley*, Mayor-elect Burke was simply announcing prospective employment decisions that would not take effect until he took office on January 1, 2004. He even acknowledged the prospective nature of his employment

decisions by stating on both November 7 and December 16 that Ms. Turner's termination would not become effective until January 1, 2004. It therefore follows that municipal liability cannot attach to any actions taken by Mayor Burke prior to that date. To suggest otherwise would unfairly expose the City to liability for actions of individuals over whom it had no control or supervision as employees.

Only if Ms. Turner had shown up for work on January 1, 2004 would the earlier discussion in this Entry about whether Mayor Burke could have constitutionally fired her become germane. Under § 36-3-3-2, on January 1, 2004, Mayor Burke would have been the City's final policy-making authority with respect to employment decisions, thereby exposing the City to municipal liability for any unlawful employment decisions. However, Ms. Turner herself chose not to return to work on January 1, 2004, and that is not an unlawful employment decision by Mayor Burke. Therefore, under *Monell*, the court cannot hold the City of Terre Haute liable as a municipality pursuant to 42 U.S.C. § 1983. Ms. Turner's decision not to show up for work, either as a records clerk or the Chief's secretary, after the Burke administration came into office prevented the administration from firing her. Regardless of whether the court accurately assessed Ms. Turner's employment to be political, no custom or policy (or action of a policy-maker) of the City of Terre Haute caused her employment with the City to end; she did.

### **III. CONCLUSION**

For the reasons stated above, and after reconsidering its August 4, 2005 Entry on Defendants' Motion for Summary Judgment, the court hereby **GRANTS** summary judgment on the one claim remaining in this case. Plaintiff Martha Turner's claim of politically motivated termination in violation of the First Amendment to the U.S. Constitution is dismissed. Judgment shall enter in favor of the Defendants on all claims.

ALL OF WHICH IS ENTERED this 25th day of October 2005.

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John Daniel Tinder, Judge  
United States District Court

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